86-982

NO.

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

WILLIAM T. HANTON,

Petitioner,

v.

ROBERT E. KENNEDY, JR., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI
To The United States Court Of Appeals
For The Sixth Circuit

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a district court may bar the submission of motions for summary judgment after a stated date, consistently with Rule 56(b) of the Federal Rules of Civil Procedure, which provides that a party against whom a claim is asserted may move for a summary judgment in his favor "at any time."

2. Whether a district court may bar the submission of a motion for summary judgment that is based on a defendant's claimed right to qualified immunity, on the ground that such a motion was not submitted by a deadline set by the district court for the submission of dispositive motions, where the basis for such a motion was not apparent until the district court issued its ruling on a prior timely motion for summary judgment, in which the district court

articulated for the first time the theory of constitutional deprivation which gave rise to the subsequent motion for summary judgment invoking the doctrine of qualified immunity.

PARTIES BELOW

This action was commenced on October 26, 1982 in the United States District Court for the Northern District of Ohio, by plaintiffs Robert E. Kennedy, Jr. and Joyce Kennedy, against defendants City of Cleveland, the Cleveland Police Department, the Mayor of Cleveland, George V. Voinovich, the then Chief of Police of Cleveland, William T. Hanton (petitioner herein), Jose Feliciano, the then Chief Assistant Prosecutor of Cleveland, and eight police officers employed by Cleveland, John Riley, Raymond Offutt, John Darrah, Joseph Lewandowski, Richard Brindza, John Joyce, Frank Wszelaki and Mark Romph. The following are no longer defendants: George V. Voinovich, Jose Feliciano, Richard Brindza, John Joyce and Mark Romph.

On appeal before the Court of Appeals for the Sixth Circuit, William T. Hanton and Frank Wszelaki were appellants and the two plaintiffs were appellees.

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OPINIONS BELOW

The District Court's Order, filed on February 12, 1985, denying petitioner's motion for summary judgment. A copy of said Order is appended hereto at page A-2.

The District Court's Judgment Entry

and Memorandum Opinion, filed on October 2, 1985, striking from the record petitioner's supplemental motion for summary judgment. A copy of said Judgment Entry and Memorandum Opinion is appended hereto at page A-33.

The decision of the United States Court of Appeals for the Sixth Circuit, issued on July 30, 1986, rehearing denied on August 27, 1986, reported at 797 F.2d 297.

JURISDICTIONAL STATEMENT

Petitioner seeks review of the decision of the Court of Appeals for the Sixth Circuit dated July 30, 1986, rehearing denied on August 27, 1986, pursuant to 28 U.S.C. § 1254(1).

Petitioner contends that the decision appealed from conflicts with the express terms of Rule 56(b) of the Federal Rules of Civil Procedure, as well as with the case of Manetas v. International Petroleum Carriers, Inc., 541 F.2d 408 (3d Cir. 1976), and decided a federal question in a way in conflict with this Court's opinion in Mitchell v. Forsyth, 105 S. Ct. 2806 (1985), thus rendering review appropriate pursuant to the criteria set forth in Rule 17.1(a) and (c) of the Supreme Court Rules.

STATUTE INVOLVED

This action involves the effect of Rule 56(b) of the Federal Rules of Civil Procedure, which provides as follows:

> (b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof. (Emphasis supplied.)

STATEMENT OF THE CASE

The original Complaint, filed on October 26, 1982 under 42 U.S.C. §§ 1983, 1985 and 1986, alleged that plaintiff, Robert E. Kennedy, Jr. ("Kennedy"), was arrested, attacked and beaten by a number of Cleveland police officers on several occasions on October 27, 1981. The Complaint did not allege that petitioner was in any way personally involved in the alleged conduct. The Complaint further alleged that an internal investigation of Kennedy's allegations, which was conducted by two other Cleveland police officers, resulted in a failure to recommend that disciplinary charges be brought against the accused officers and that such charges were not brought, thereby finding that those officers had acted properly. The Complaint alleged

that the failure to bring such charges was pursuant to a policy of the City of Cleveland.

On November 1, 1984, after extensive discovery by the parties, several defendants, including the petitioner herein, filed motions for summary judgment. In his motion, petitioner argued that the only fact claimed by Kennedy, in his responses to defendants' interrogatories, in support of his allegation that supervisory officials of Cleveland knew of the alleged City policy, was that petitioner, as its Chief of Police, "knew or should have known" that Kennedy was mistreated, and took no disciplinary action against the accused officers. Petitioner's Statement of Reasons in support of his motion for summary judgment argued that even if it were assumed that the internal

investigation of Kennedy's allegations and the decision not to administratively prosecute the accused officers constituted a "cover up" of their alleged misconduct, Kennedy was not deprived of any federal rights as a result, since any deprivations were complete as of the date of the alleged assaults.

In its Order of February 12, 1985, the District Court denied petitioner's request for a summary judgment, stating that a genuine and material issue of fact existed as to whether petitioner was a party to a "post-assault cover-up conspiracy."[1] The District Court,

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1 The District Court also held that petitioner, as the chief supervisory officer of Cleveland's police force, could be held liable under 42 U.S.C. § 1983, along with the City itself, for a "single, unusually brutal or egregious beating," a theory rejected by this Court in City of Oklahoma City v. Tuttle, 105 S. Ct. 2427 (1985).

acknowledging that "Kennedy must demonstrate a constitutional tort caused by the alleged post-assault cover-up conspiracy separate from the constitutional torts arising from the alleged beatings," held that the alleged conspiracy could have caused a constitutional tort, i.e., a denial of "Brady" material to Kennedy in the criminal trial of the charges against him. It was the District Court's view that the internal investigation resulted in the taking of statements of witnesses to an alleged post-arrest beating of Kennedy at which the arresting officers were either present, or participated in or gave encouragement to, and that such statements constituted "Brady" material because the persons who gave the statements could have given testimony at the criminal trial of Kennedy which was

relevant to the credibility of the arresting officers.

On September 24, 1985, petitioner filed a supplemental motion for summary judgment. In that motion, petitioner raised, for the first time, his claim to qualified immunity, pointing out that he could not have reasonably known that participating in the alleged "post-assault cover-up conspiracy" would deprive Kennedy of "Brady" material. His supporting Statement of Reasons incorporated a prior Application for Clarification filed on February 26, 1985, in which were indicated a number of reasons for the invalidity of the "Brady" material theory set forth in the District Court's

Order of February 12, 1985.[2]

On October 2, 1985, the District Court filed its Judgment Entry striking petitioner's supplemental motion for summary judgment from the record. In its supporting Memorandum Opinion filed the same date, the District Court stated, incorrectly, that petitioner's November 1, 1984 summary judgment motion "sought relief based in part upon immunity" and that his supplemental motion for summary judgment was filed without the leave of the District Court.

Petitioner took an interlocutory appeal from the District Court's October 2, 1985 ruling, on the basis of the holding of this Court in Mitchell v.

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2 In its Feb. 12, 1985 Order, the District Court stated that any motions for reconsideration of its rulings would be denied summarily.

Forsyth, 105 S. Ct. 2806 (1985). The Sixth Circuit Court of Appeals, in its decision of July 30, 1986, reported at 797 F.2d 297, held that the District Court had properly set November 1, 1984 as a deadline for the filing of dispositive motions, and that petitioner's supplemental motion for summary judgment, having been filed after the deadline set by the District Court, was properly denied by the District Court for not having been timely filed.[3]

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3 The Court of Appeals alternatively stated that while it was "difficult" to do so, it was "not impossible" to read petitioner's Nov. 1, 1984 summary judgment motion as a claim of immunity, 797 F.2d at 304, and that his time for appeal from its denial passed without the noticing of an appeal. In fact, however, nothing in the Nov. 1, 1984 motion invoked the doctrine of qualified immunity because nothing in the Complaint asserted the "post-assault cover-up" constitutional tort theory stated in the District Court's Feb. 12, 1985 ruling.

On August 13, 1986, petitioner asked the Court of Appeals for a rehearing, on the ground that the constitutional deprivation theory relating to the alleged "cover-up" had not been asserted, either in the Complaint or in any other manner, at the time the November 1, 1984 summary judgment motion was made, and that such a theory was not only never asserted in the Complaint, but was unforeseeable.[4]

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4 Indeed, it is highly significant that even Kennedy's Amended Complaint, which was filed on Sept. 24, 1985, contained no allegation that the alleged "cover-up" deprived him of a constitutional right to "Brady" material.

ARGUMENT

Two important issues are presented by this petition regarding the availability of summary judgment procedures by the chief of a large metropolitan police force in an action against him under 42 U.S.C. § 1983. First, whether a District Court may properly limit the time in which a defendant may seek a summary judgment, despite the express provision of Rule 56(b) of the Federal Rules of Civil Procedure that such a motion for a summary judgment may be made "at any time . . . ." See Manetas v. International Petroleum Carriers, Inc., 541 F.2d 408, 413 (3d Cir. 1976) (pretrial order limitation for filing summary judgment motions not a bar to later filing in light of express authorization in Rule 56(b) for a

defendant to move "at any time"). In this case, the Court of Appeals' approval of the District Court's refusal to consider the merits of petitioner's supplemental summary judgment motion, on the ground that it was not filed within the time set forth in the District Court's pretrial order, was directly contrary to the express language of Rule 56(b).

Second, whether a District Court may effectively deny a defendant the opportunity to move for summary judgment on the ground of qualified immunity by requiring such a defendant to file a motion therefor at a time prior to the emergence of the legal basis for such a motion. In this case, the District Court created such a "Catch-22" situation because the basis upon which petitioner sought qualified

immunity, i.e., that no reasonably competent official could have perceived his conduct to deprive a person in Kennedy's position of a constitutional right to "Brady" material, had not been asserted by the time of the District Court's November 1, 1984 deadline for the filing of dispositive motions. Indeed, it was not fully articulated until February 12, 1985, when the District Court hypothesized that such a constitutional tort could have inhered in petitioner's alleged participation in the alleged "post-assault cover-up conspiracy" in connection with the internal police investigation of Kennedy's allegations. The fact that the Complaint alleged no such deprivation rendered it impossible for petitioner to anticipate such a deprivation theory when he filed his

summary judgment motion in compliance with the District Court's deadline.[5] The acceptance of the District Court's rationale for refusing to consider the merits of petitioner's claim of qualified immunity effectively deprived him of the right to the pretrial ruling and interlocutory appeal mandated by Mitchell v. Forsyth, supra.

The rulings of the courts below, in refusing to consider petitioner's motion for summary judgment on the basis of qualified immunity, was contrary to the purpose of the procedures set forth in Rule 56. As this Court recently stated, "[o]ne of the principal purposes of the summary

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5 Even afterwards, when he filed an amended complaint on Sept. 24, 1985, Kennedy advanced no such claim, thus confirming the unpredictability of the District Court's hypothesis.

judgment rule is to isolate and dispose of factually unsupported claims or defenses, and we think that it should be interpreted in a way that allows it to accomplish this purpose." Celotex Corp. v. Catrett, 106 S. Ct. 2548, 2553 (1986). The decisions below denied petitioner the right to use the summary judgment rule, contrary to the plain language of Rule 56(b).

For the reasons stated above, petitioner respectfully requests that this Honorable Court grant a writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing Petition were mailed this 25th day of November, 1986 to each of the following:

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RULE 56(b),
FEDERAL RULES OF CIVIL PROCEDURE

A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT E. KENNEDY, JR., et al.,	)	
Plaintiffs,	)	CASE NO. C82-2932
vs.	)	
CITY OF CLEVELAND, et al.,	)	ORDER
Defendants.	)	

Plaintiffs filed a complaint on October 26, 1982, alleging a series of civil rights violations against a number of defendants, including the City of Cleveland, George Voinovich, William Hanton, Jose Feliciano, John Riley, Raymond Offutt, John Darrah, Joe Lewandowski, Richard Brindza, Lt. Joyce, Frank Wszelaki, Mark Romph.

Summarized briefly, the plaintiff Robert Kennedy claims initially that he was beaten at the time of his arrest for

a traffic offense by defendants Riley and Offutt, and again at the Cleveland Police Department. Complaining of injury, Kennedy was subsequently transported to Metro Hospital where he was subjected to additional beatings by defendants Darrah and Lewandowski with the acquiescence of Riley and Offutt. Following Kennedy's release from custody, he alleges that he went into a deep coma and was hospitalized in intensive care for eleven days as a result of the beatings.

A second claim raised by Kennedy relates to the allegation that a post-assault cover-up conspiracy involving the defendants Hanton, Brindza, Wszelaki, and Romph, resulted in additional constitutional torts. Kennedy was charged with a series of offenses including a traffic light

violation, two assaults, resisting arrest, and possession of a concealed weapon, i.e., a knife. Kennedy's wife filed a claim of police brutality asserting that Kennedy had been seriously injured as the result of the arresting process.

The Cleveland Police Department caused an investigation of the conduct of Riley, Offutt, Darrah and Lewandowski, to be conducted by the Professional Conduct and Internal Revenue Unit (PCIR) of Cleveland's police force. Defendants Romph and Wszelaki, members of the PCIR Unit, took numerous statements from police officers and personnel at Metro Hospital as part of the investigation. Sergeant Wszelaki filed a report summarizing the investigation and recommended that no disciplinary action be taken against any

of the police officers in the alleged beating of Kennedy. After a conference was held following the receipt of Wszelaki's recommendation which was attended by Jose Feliciano and Patrick Roche, police prosecutors for the City of Cleveland's Law Department, and Wszelaki, no action was taken against any of the police officers.

Subsequently, a lengthy jury trial was conducted in Cleveland Municipal Court on the criminal charges brought against Kennedy. At the close of the government's case, the presiding trial judge, upon motion of the defendant Kennedy, entered acquittals on the two assault charges and the charge of carrying a concealed weapon. Thereafter, in return for the defendant's no contest plea to the minor misdemeanor of disorderly conduct, the

remaining charges of the traffic light violation and resisting arrest were dismissed by the prosecution.

The defendant George Voinovich is the Mayor of the City of Cleveland, and the defendant William Hanton is the Chief of Police for the City of Cleveland.

The defendant Richard Brindza is a sergeant in the Cleveland Police Department who had supervisory authority over Riley, Offutt, Darrah, and Lewandowski on the evening in question.

In February, 1983, the Court dismissed Jose Feliciano, the Cleveland Police Prosecutor who oversaw the prosecution of Kennedy.

Lt. Joyce was an officer with supervisory power over Riley, Offutt, Darrah and Lewandowski, and was joined as a defendant. However, he was

dismissed by an agreement of counsel for the plaintiff and Joyce on October 31, 1984.

Presently pending before the Court are a series of motions which the Court will now address.

I. THE MOTIONS OF THE DEFENDANTS CITY OF CLEVELAND, GEORGE VOINOVICH, WILLIAM HANTON, RICHARD BRINDZA, JOHN RILEY AND RAYMOND OFFUTT FOR A DISMISSAL OF PLAINTIFF ROBERT E. KENNEDY'S CLAIM BROUGHT PURSUANT TO THE PROVISIONS OF 42 U.S.C. §§1985 and 1986.

The Court by orders filed June 24, 1983, has previously dismissed Kennedy's claim brought pursuant to 42 U.S.C. §§1985 and 1986 against the defendants Joyce, Romph, Wszelaki, Darrah, and Lewandowski. The reasoning upon which the §1985, and §1986 claims were dismissed against the latter defendants is equally applicable to the moving defendants. Hence, the motions of the above-named defendants to dismiss

Kennedy's claims brought pursuant to 42 U.S.C. §§1985 and 1986 are sustained.

II. PENDING MOTIONS FOR ATTORNEY'S FEES.

There are presently pending before the Court a number of motions for attorney fees. One such motion was filed by counsel for the plaintiffs for fees required to oppose the City's interlocutory appeal to the Court of Appeals for the Sixth Circuit which was dismissed.

In opposing the motion for fees, the City cites Buian v. Baughard, 687 F.2d 859, 861 (6th Cir. 1982), and the fact that no costs were allowed by the Court of Appeals for the proposition that plaintiff's application is premature. The Court agrees.

Other motions are pending for fees for sanctions. The Court will hold all

such motions in abeyance, subject to further order of the Court.

III. PLAINTIFFS' MOTION FOR LEAVE TO FILE WSZELAKI DEPOSITION TRANSCRIPT EXCERPTS AND CORRESPONDING PAGE REFERENCES IN BRIEF.

Good causing having been shown, leave is granted.

IV. PLAINTIFFS' MOTION FOR LEAVE TO PERMIT FILING OF SIGNATURE AND CHANGES OF THE DEPOSITIONS BEING FILED FOR PURPOSES OF PLAINTIFFS' BRIEF IN RESPONSE TO DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT.

Good causing having been shown, leave is granted.

V. DEFENDANT CITY OF CLEVELAND'S MOTION FOR PROTECTIVE ORDER QUASHING NOTICE TO TAKE DEPOSITION OF PATRICK ROCHE, FIRST ASSISTANT PROSECUTOR OF THE CITY OF CLEVELAND.

The motion is granted with the condition that none of the defendants will be permitted to present, as a witness in their behalf, the testimony of Patrick Roche.

VI. THE PLAINTIFFS' MOTION FOR LEAVE TO DEPOSE JOSE FELICIANO AND TO COMPEL THE DEFENDANT WSZELAKI TO ANSWER QUESTIONS HE REFUSED TO ANSWER AT HIS DEPOSITION AND FOR THE COURT TO RECONSIDER ITS EARLIER DECISION WITHHOLDING SIX DOCUMENTS FROM THE PLAINTIFFS ON THE BASIS OF THE ATTORNEY-CLIENT PRIVILEGE.

Upon consideration, the motions are overruled.

VII. DEFENDANTS' MOTION TO STRIKE PLAINTIFFS' RESPONSE TO CITY'S REQUEST FOR SUPPLEMENTATION OF ANSWERS TO INTERROGATORIES, AND FOR AWARD OF ATTORNEY'S FEES PURSUANT TO RULE 11, FEDERAL RULES OF CIVIL PROCEDURE.

Upon consideration, the motion is denied.

VIII. THE PLAINTIFFS' MOTION TO COMPEL DISCOVERY OF ITEM NO. 12 OF OCTOBER 4, 1983 SUBPOENA AND LEGIBLE COPIES OF CERTAIN DOCUMENTS PREVIOUSLY PRODUCED.

No response having been filed to plaintiffs' motion, and no indication having been provided the Court that the defendant City of Cleveland has complied with the spirit of the motion, or that the City has responded to item no. 12 of

the October 4, 1983 subpoena, the motion is granted. Plaintiffs' request for reasonable attorney fees will be held in abeyance.

Defendant City of Cleveland is ordered to comply with discovery requests by February 22, 1985 or show cause why the Court should not consider appropriate contempt proceedings.

IX. PLAINTIFFS' MOTION FOR ORDER COMPELLING DEFENDANT VOINOVICH TO COMPLY WITH COURT ORDER BY ANSWERING INTERROGATORIES, FOR REASONABLE EXPENSES INCLUDING ATTORNEYS' FEES AND FOR ADDITIONAL SANCTIONS.

The motion to compel is now moot as the defendant Voinovich responded to interrogatories one day after the above-motion was filed. The motion for reasonable expenses including attorneys' fees shall be held in abeyance until the conclusion of these proceedings.

X. THE PLAIINTIFFS' FEBRUARY 1, 1985, MOTION TO DEPOSE DEFENDANT VOINOVICH.

The Court has previously denied plaintiffs' request to proceed with deposition on oral examination of the defendant George Voinovich, Mayor of the City of Cleveland. Upon further consideration of the issue, including the plaintiffs' brief in support of the motion, including the letter to the editor of the Cleveland Plain Dealer submitted by John D. Maddox, Law Director of the City of Cleveland, and upon consideration of the answers and objections to interrogatories submitted to the defendant Voinovich, the motion is denied.

XI. MOTION OF THE DEFENDANTS CITY OF CLEVELAND, GEORGE VOINOVICH, WILLIAM T. HANTON AND RICHARD BRINDZA FOR AN ORDER STRIKING THE DEPOSITION EXCERPTS FILED BY PLAINTIFFS IN OPPOSITION TO DEFENDANTS' SUMMARY JUDGMENT MOTIONS.

The above-motion was filed on February 4, 1985, and relates to excerpts of depositions taken of the defendant Hanton, the ex-defendant Joyce, and McNamara. Counsel for the plaintiffs are granted leave to file an opposition brief by February 22, 1985.

INTRODUCTION TO SUMMARY JUDGMENT MOTION RULINGS

The Court has for its consideration a series of motions for summary judgment being prosecuted by the defendants City of Cleveland, Voinovich, Hanton, Brindza, Romph and Wszelaki.

Kennedy claims §1983 violations by not only the four officers directly involved in his beatings, defendants Riley, Offutt, Darrah and Lewandowski, but also that the City of Cleveland bears responsiblity by virtue of a series of theories including poor

training, a pattern of indifference to police misconduct which fosters the type of police misconduct alleged in this action, official participation in a post-assault conspiracy to cover-up the activities of the offending officers, the existence of conflict of interest situation between the City's duty to identify and stifle police misconduct and the City's finanical stake in avoiding judgments against its individual police officers because the City's collective bargaining agreement with the police union requires the City to indemnify the individual officers for judgments rendered against police officers.

The plaintiffs charge that Voinovich and Hanton should be held liable because of their supervisory responsibilities with respect to the police department.

Romph and Wszelaki are charged with participation in the alleged post-assault cover-up conspiracy. Brindza, as the immediate supervisor of the four defendants alleged to have directly participated in the several assaults, is also joined as a defendant.

XII. THE CITY OF CLEVELAND'S MOTION FOR SUMMARY JUDGMENT.

The motion of the City of Cleveland for a summary judgment is denied. In consideration of Cleveland's motion, the Court has read the transcript of Kennedy's criminal jury trial, examined the written statements of many of the employees of Metro Hospital taken by Romph and Wszelaki, the statements of the many police officers interviewed by Romph and Wszelaki, the affidavits filed by the parties, and studied the lengthy briefs filed by opposing counsel.

The Court's review of the materials submitted has been conducted against the background of Monell v. Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018 (1978), which reversed Monroe v. Pape, 365 U.S. 167 (1961) and held that local governments such as municipalities are persons within the meaning of 42 U.S.C. §1983. However, Monell emphasized that respondeat superior is not a permissible theory for holding a local government body liable for constitutional violations of its employees. Rather, a local government is liable under §1983 when "a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers can be causally related to the allegedly unconstitutional conduct of the employees." See Monell, p. 2036. As

previously indicated, Kennedy attempts to hold the City of Cleveland in this case by resorting to a number of theories of liability, acknowledging that the concept of respondeat superior does not pertain to the §1983 claims. The decision in Monell has led to the development of a substantial body of case law with regard to the question of whether the local government is liable for the constitutional torts of its employees. However, an exhaustive review of the case law is unnecessary at this time as the only issue before the Court is whether defendant City's motion for summary judgment should be sustained.

The Court finds that this is the type of case, viewed in a light most favorable to the plaintiffs, described in the case of Turpin v. Mailet, 619 F.2d 196, 202 (2d Cir. 1980) where it

was held:

> . . . (W)e agree that, absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, a policy could not ordinarily be inferred from a single incident of illegality such as a first arrest without probable cause or with excessive use of force. . . . However, a single, unusually brutal or egregious beating administered by a group of municipal employees may be sufficiently out of the ordinary to warrant an inference that it was attributable to inadequate training or supervision amounting to deliberate indifference or "gross negligence" on the part of the officials in charge. See Owens v. Haas, 601 F.2d 1242 (2d Cir. 1979) . . . (emphasis added).

Additionally, the Court is of the view that the recent decisions of the Ohio Supreme Court in Haverlack v. Portage Homes, 2 Ohio St.3d 26 (1982) and Strohofer v. Cincinnati, 6 Ohio St.3d 118 (1983), require that the City's motion for summary judgment be

overruled with respect to the state pendent actions.

XIII. MOTION OF THE DEFENDANT VOINOVICH FOR SUMMARY JUDGMENT.

A study of the materials presented in support of and in opposition to Mayor Voinovich's motion for summary judgment fails to disclose any legal basis upon which Mayor Voinovich could be held liable either personally or in his individual capacity. The motion of the defendant George Voinovich for summary judgment against the plaintiffs is granted.

XIV. MOTION OF THE DEFENDANT HANTON FOR SUMMARY JUDGMENT.

Chief Hanton is the chief supervisory officer of the Cleveland Police Department. Given the Court's analysis as set forth with respect to the denial of the City's motion for summary judgment, it follows that the

trier of fact could find with respect to plaintiff Kennedy's claims growing out of the alleged assaults that Hanton's alleged failures with respect to training and disciplining had a causal relationship to Kennedy's injuries suffered as a result of the alleged beatings. Furthermore, with respect to the post-assault cover-up conspiracy, a trier of fact could find, based upon the materials presented, that the defendant Hanton was a party to the conspiracy. Stated in the language of summary judgment motion practice, the Court finds genuine issues of material fact exist. Thus, the defendant Hanton's motion for summary judgment is denied.

XV. MOTION OF THE DEFENDANT BRINDZA FOR SUMMARY JUDGMENT.

Sergeant Brindza was working in a supervisory capacity on October 27,

1981, as to defendants Riley, Offutt, Darrah, and Lewandowski. Brindza had contact with Kennedy at the arrest scene, at the jail, and at Metro Hospital. At no time did Kennedy complain to Brindza about police misconduct. Brindza did not observe any police misconduct. There is no evidence that Brindza was present during any of the alleged violations of Kennedy's civil rights. With respect to Kennedy's prosecution, Brindza's role was limited to recommendations to Riley as to the charges to be filed based upon Riley's report of Kennedy's conduct.

Brindza sprayed mace upon Kennedy at the arrest scene. However, no claim is advanced by Kennedy that he was injured by reason of the application of mace.

No claim was advanced that Brindza was a part of the alleged post-assault

cover-up conspiracy.

The mere fact that Brindza had supervisory authority over Riley, Offutt, Darrah, and Lewandowski, on the evening of the alleged assaults is insufficient to predicate liability on the part of Brindza without more. In sum, the submission as to Brindza's motion for summary judgment, fails to demonstrate, viewed in a light most favorable to Kennedy, that Brindza was either directly responsible for or personally participated in the alleged deprivation of Kennedy's constitutional rights. See Smith v. Heath, 691 F.2d 220 (1982).

The motion of the defendant Richard Brindza for summary judgment is granted.

XVI. MOTION OF DEFENDANT ROMPH FOR SUMMARY JUDGMENT.

Kennedy's case against Romph and

Wszelaki is limited to the allegation that both officers, as members of the PCIR Unit of the police department, participated in the alleged post-assault cover-up conspiracy. Romph attests that after he engaged in interviewing witnesses and obtaining written statements from the witnesses, his participation in the investigation was concluded in that he did not make a recommendation nor participate in the presentation of the information developed to the police prosecutors. In an attempt to defeat Romph's motion for summary judgment, counsel for Kennedy argue that the investigation conducted by Wszelaki and Romph was flawed in a number of respects.

The Court finds no merit in plaintiffs' contentions. The Court finds no genuine issue as to any

material fact as to Romph's motion. Viewing the submission in a light most favorable to the plaintiffs, the Court finds Romph's motion for summary judgment to be well taken and grants the same.

XVII. MOTION OF DEFENDANT WSZELAKI FOR SUMMARY JUDGMENT.

As a threshold matter, in order for Kennedy to defeat Wszelaki's motion for summary judgment, Kennedy must demonstrate a constitutional tort caused by the alleged post-assault cover-up conspiracy separate from the constitutional torts arising from the alleged beatings. Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979), Landrigan v. City of Warlick, 628 F.2d 736 (1st Cir. 1980). Kennedy asserts that the additional consititutional torts include false arrest, false imprisonment,

malicious prosecution, abuse of process, and a failure to turnover Brady material in connection with Kennedy's criminal trial.

The alleged police beatings of Kennedy occurred on October 27, 1981. Wszelaki's final report recommending no disciplinary action against the accused officers was approved in January of 1982. Kennedy's trial did not commence until June 14, 1982. Wszelaki and Romph did not investigate the criminal charges against Kennedy, but rather the claim that Riley, Offutt, Darrah and Lewandowski had assaulted Kennedy. Moreover, the criminal process with respect to Kennedy had been initiated prior to the Wszelaki-Romph investigation.

The issue distills to consideration of whether evidence exists to support

Kennedy's claim that the alleged post-assault cover-up conspiracy had as a goal the continued and unjustified prosecution of Kennedy as a counter-measure to Kennedy's brutality countercharges against officers of the police department. In that respect, plaintiffs claim that the City of Police Prosecutors delivered no Brady material notwithstanding the fact that numerous hospital employees had provided information in the Wszelaki-Romph investigation charging Cleveland Police officers with brutality under circumstances where a trier of fact could find that Riley and Offutt, the arresting officers of Kennedy, had either participated, witnessed, or given encouragement to the alleged hospital beating of Kennedy. The defendants scoff at the notion that the statements

obtained by the Wszelaki-Romph investigation constitute Brady material. This Court has read the transcript of the criminal trial of Kennedy and disagrees. The credibility of Riley and Offutt was in issue during Kennedy's criminal trial. The statements obtained by Wszelaki and Romph from the hospital personnel were, if believed, sufficient to place in issue the credibility of Riley and Offutt as to the claim that Kennedy attacked Riley at the arrest scene. For instance, if the trier of fact were to find that Riley and Offutt or either one of them had participated, encouraged, or observed police brutality directed toward Kennedy at Metro Hospital, then the trier of fact might well conclude that Riley and Offutt's testimony at the criminal trial was not worthy of belief.

In sum, the Court concludes that defendant Wszelaki's threshold challenge to plaintiff's post-assault conspiracy charge fails upon the determination that additional constitutional torts may be established as a result of the alleged post-assault cover-up conspiracy.

Unlike Romph, Wszelaki made the recommendation that no disciplinary action be taken against any of the police officers alleged to have engaged in police brutality. The recommendation was discussed with the police prosecutors who later prosecuted Kennedy. In view of the nature and dissemination of Wszelaki's recommendation, the Court finds that a trier of fact could reasonably find that not only did a post-assault cover-up conspiracy exist, but that Wszelaki participated in the conspiracy. So

finding, Wszelaki's motion for summary judgment is denied.

CONCLUSION

The defendant City of Cleveland has successfully prevented the plaintiffs from taking the depositions of police prosecutors Feliciano and Roche. The Court will not allow either Feliciano or Roche to testify if called as witnesses by any of the defendants unless Feliciano and Roche are hereafter made available for discovery deposition by the plaintiffs. The Court restates this ruling for emphasis in view of the Court's announced finding, based upon the materials submitted in support of and in opposition to the motions for summary judgment, that a basis exists for the plaintiff Robert Kennedy to assert that a post-assault cover-up conspiracy existed with respect to his

alleged continued and unjustified prosecution and that such conspiracy gave rise to additional constitutional torts committed against Kennedy separate from the alleged beatings. In the event the trier of fact would find a conspiracy to have existed, and that Feliciano and Roche, or either one of them, was a member of the conspiracy, neither Feliciano, formerly a defendant in this action, nor Roche, could be held liable because of the rule of law respecting absolute immunity for prosecutors. However, it remains an open question in the Court's view as to whether the defendant City of Cleveland is subject to liability for the alleged post-assault constitutional torts.

In the event defendant City of Cleveland, upon further reflection, now finds it appropriate to call as its

witness either Feliciano or Roche, it must so notify counsel for the plaintiffs by February 22, 1985 and make available Feliciano and Roche for discovery depositions at a time convenient to all concerned with the understanding that the discovery depositions shall be completed by March 22, 1985. Failure of the defendant City of Cleveland to so notify and make available Feliciano and Roche for discovery deposition will foreclose the presentation of Feliciano and Roche as witnesses on behalf of the defendants.

The management of this case has required an extraordinary amount of the Court's time. Consequently, any motions filed by any party for reconsideration of the rulings herein stated will be denied summarily.

IT IS SO ORDERED.

/s/David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT E. KENNEDY, JR., et al.,	)	
Plaintiffs,	)	CASE NO. C82-2932
vs.	)	
CITY OF CLEVELAND, et al.,	)	JUDGMENT ENTRY
Defendants.	)	

For the reasons stated in the Memorandum Opinion filed contemporaneously herewith, IT IS ORDERED, ADJUDGED, AND DECREED that the defendant Wszelaki's motion filed October 1, 1985, seeking the Court's reconsideration of his November 1, 1984 motion for summary judgment which was denied on February 12, 1985, is stricken from the record.

Further for the reasons stated in the Memorandum Opinion filed

contemporaneously herewith, IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendant Hanton's motion filed September 24, 1985, and styled as a "supplement" to the defendant's November 1, 1984 motion for summary judgment which was denied on February 12, 1985, is stricken from the record.

/s/David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge

DOWD, J.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROBERT E. KENNEDY, JR., et al.,	)	
Plaintiffs,	)	CASE NO. C82-2932
vs.	)	
CITY OF CLEVELAND, et al.,	)	MEMORANDUM OPINION
Defendants.	)	

The defendant William Hanton, Chief of the Cleveland Police Department, and the defendant Frank Wszelaki, a sergeant in the Cleveland Police Department, filed motions on September 24, and October 1, 1985, respectively, without leave of court, seeking reconsideration of the Court's February 12, 1985, order denying their separate motions for summary judgment, based on part upon a claim of immunity.

This is an action prosecuted pursuant to the provisions of 42 U.S.C. § 1983. Plaintiffs filed a complaint on October 26, 1982, alleging a series of civil rights violations against a number of defendants, including the City of Cleveland, William T. Hanton, John Riley, Raymond Offutt, John Darrah, Joe Lewandowski, and Frank Wszelaki.

Summarized briefly, the plaintiff Robert Kennedy claims initially that he was beaten at the time of his arrest for a traffic offense by defendant Riley and Offutt, and again at the Cleveland Police Department. Complaining of injury, Kennedy was subsequently transported to Metro Hospital where he was subjected to additional beating by defendants Darrah and Lewandowski with the acquiescence of Riley and Offutt. Following Kennedy's release from

custody, he alleges that he went into a deep coma and was hospitalized in intensive care for eleven days as a result of the beatings.

A second claim raised by Kennedy relates to the allegation that a post-assault cover-up conspiracy involving the defendants Hanton, and Wszelaki, resulted in additional constitutional torts. Kennedy was charged with a series of offenses including a traffic light violation, two assaults, resisting arrest, and possession of a concealed weapon, i.e., a knife. Kennedy's wife filed a claim of police brutality asserting that Kennedy had been seriously injured as a result of the arresting process.

The Cleveland Police Department caused an investigation of the conduct of Riley, Offutt, Darrah and

Lewandowski, to be conducted by the Professional Conduct and Internal Revenue Unit (PCIR) of Cleveland's police force. Defendant Wszelaki, a member of the PCIR Unit, took numerous statements from police officers and personnel at Metro Hospital as a part of the investigation. Sergeant Wszelaki filed a report summarizing the investigation and recommended that no disciplinary action be taken against any of the police officers even though a number of hospital personnel at Metro Hospital gave statements implicating some of the Cleveland police officers in the alleged beating of Kennedy. After a conference was held following the receipt of Wszelaki's recommendation which was attended by police prosecutors for the City of Cleveland's Law Department, and Wszelaki, no action was

taken against any of the police officers.

Subsequently, a lengthy jury trial was conducted in Cleveland Municipal Court on the criminal charges brought against Kennedy. At the close of the government's case, the presiding trial judge, upon motion of the defendant Kennedy, entered acquittals on the two assault charges and the charge of carrying a concealed weapon. Thereafter, in return for the defendant's no contest plea to the minor misdemeanor of disorderly conduct, the remaining charges of the traffic light violation and resisting arrest were dismissed by the prosecution.

Sergeant Wszelaki and the Chief of Police of the Cleveland Police Department have each been sued in both their individual and official capacity. Based upon the recent ruling of the

United States Supreme Court and Brandon v. Holt, 53 U.S.L.W. 4122, it is apparent that if either Hanton or Wszelaki are liable in their official capacity to the plaintiff, then a judgment against either on that basis would be the basis for a judgment against the City of Cleveland, also a defendant in this case. Brandon v. Holt also teaches that the defense of immunity, be it complete or qualified, does not apply where a governmental official is sued in his official capacity. However, in this case, both Hanton and Wszelaki are also sued in their individual capacities.

Both defendants, by way of November 1, 1984 motions for summary judgment, sought relief based in part upon immunity. In his answer Hanton set up immunity as a defense. Wszelaki alleged

as a defense that his actions were taken in good faith, but he did not allege immunity as a specific defense. Hanton's affidavit filed in support of his motion for summary judgment at paragraphs 9 and 10 appears to rely upon the defense of qualified immunity. A similar conclusion can be reached by reading paragraph 9 of Wszelaki's affidavit filed in support of his motion for summary judgment. On February 12, 1985, the Court denied the Hanton-Wszelaki motions for summary judgment. The defendants have now asked without leave of court, on the eve of trial, a reconsideration of the summary judgment motions. Hanton describes his September 24, 1985, motion as a "supplement" to his prior November 1, 1984 motion for summary judgment.

This case had already been delayed

by an unsuccessful interlocutory appeal taken by the City of Cleveland.

Further delay occurred upon the Court's declaration of a mistrial on April 19, 1985, after eight days of a jury trial. The Court recognized that a conflict of interest existed for Assistant Cleveland Law Director Irving Berger who was attempting to represent in the same trial the interests of the defendant Sergeant Wszelaki and the City of Cleveland. Sergeant Wszelaki had testified for more than a day and it became apparent during his testimony on cross examination that he was relying, inferentially with respect to the defense of qualified immunity, on policies established by the City of Cleveland, and alleged by plaintiffs to form a basis for their claims against Cleveland, for his conduct in the

internal investigation of the plaintiff Robert Kennedy's claims of police brutality. Given the opportunity to state that he wished separate counsel, Sergeant Wszelaki chose that option. Thereafter, counsel of Wszelaki' choice stated to the Court that they were unable to proceed with the trial and counsel for the plaintiff indicated opposition to a bifurcation during trial of their claims against Wszelaki. The Court then declared a mistrial and promptly rescheduled this case for re-trial on October 7, 1985.

A flurry of motions filed by the defendants followed and again on September 17, 1985, the Court ruled on the various motions and once again declared that the case would proceed to trial on October 7, 1985, as previously ordered on April 14, 1985.

Between the granting of the mistrial on April 19, 1985, and the motions for reconsideration, the United State Supreme Court in a decision published in June of 1985 in Mitchell v. Forsyth, 53 U.S.L.W. 4798, granted the right of interlocutory appeal in actions brought pursuant to 42 U.S.C. § 1983 where the claim of qualified immunity raised upon a motion to dismiss or upon a motion for summary judgment has been denied.

It is apparent that since the Court's ruling in February of 1985 denying Hanton and Wszelaki's motions for summary judgment on the basis of immunity, these defendants have had the right to an interlocutory appeal to the extent their motions for summary judgment were predicated upon the claim of immunity. The first question that arises is whether that right to an

interlocutory appeal continues for more than a period of thirty days from the ruling from which an appeal is being taken. It is apparent to the Court that such a question has occurred to counsel for the defendant Hanton and Wszelaki. Hence the "motions to reconsider" or "to supplement" the motion for summary judgment. The Court knows of no authority for a motion to reconsider and none has been cited. When the Court ruled on a variety of motions on February 12, 1985, including Hanton and Wszelaki's motion for summary judgment, the Court declared that it would summarily strike any motions for reconsideration. (This case has already generated over 450 separately docketed motions, briefs, orders, etc.) When the Court declared a mistrial in April of 1985, after eight days of trial, it once

again discouraged the re-filing of more motions as had been the case. However, the Court noted that it would accept timely filed motions from new counsel for the defendant Wszelaki.

If one were to take the position that neither Wszelaki nor Hanton could have known in February that they had the right to an interlocutory appeal because the decision in Mitchell v. Forsyth had not been announced, even by that analysis the right to take the interlocutory appeal began with the decision in Mitchell v. Forsyth which was handed down on June 19, 1985.

The Court will not consider the Wszelaki motion to reconsider the motion for summary judgment. No leave was sought to file the motion for reconsideration six days before the stated date for the new trial to

commence. In an oral hearing conducted on October 2, 1985, no good cause was shown for the inordinate delay. Additionally, the Court had the benefit of listening to Wszelaki's testimony for a lengthy period during the trial in April of 1985. The Court is reluctant to attempt to accurately summarize that testimony. Such a summary depends first upon the Court's recollection unaided by reference to a transcript. As the Court recalls, the gist of Wszelaki's testimony with respect to his internal investigation of the alleged beating of Kennedy at the hospital was to the effect that the statements, in writing, of the challenged police officers were as a matter of policy taken to be truthful and worthy of belief in the face of contradictory evidence by civilian witnesses--even though the

police officers refused to consent to face-to-face interviews and despite the fact that the civilian witnesses, who offered testimony to the effect that Kennedy was beaten while handcuffed and seated in a wheel chair being escorted by hospital personnel, were questioned extensively in face-to-face interviews by the "question and answer" method by Wszelaki. In sum, the trier of fact could reasonably conclude from the testimony of Wszelaki that he was knowingly part of a process designed to cover up police misconduct toward Kennedy.

In sum, the Court finds no good cause for it to reconsider its denial in February of 1985, of the defendant Wszelaki's motion for summary judgment to the extent it was based upon the claim of immunity. The defendant

Wszelaki's motion filed October 1, 1985, seeking the Court's reconsideration of his November 1, 1984 motion for summary judgment which was denied on February 12, 1985, is stricken from the record.

As for the defendant William Hanton, the Court finds no good cause shown for it to reconsider its February 12, 1985, order denying Hanton's motion for summary judgment or in the alternative for it to allow the defendant Hanton to "supplement" his November 1, 1984 motion for summary judgment. The defendant Hanton's motion filed September 24, 1985, and styled as a "supplement" to the defendant's November 1, 1984 motion for summary judgment which was denied on February 12, 1985, is stricken from the record.

This case will proceed to trial as ordered on October 7, 1985.

IT IS SO ORDERED.

/s/David D. Dowd, Jr.
David D. Dowd, Jr.
U. S. District Judge